PRINCIPLES OF REFORM IN PENAL LAW

The traditional methods of dealing with crime and the conceptions and habits of thought which sustain them form a stronghold of conservatism. To attack it is to meet the reproach of devotion to mere theory and abandonment of practical good sense. It is time for reformers to show that the reproach properly falls upon prevailing notions and practices, and that there is a pressing necessity for a scientific study of the subject in the light of human nature and of experience. Penal law as it exists has grown out of the theoretic study of crime as an entity. Its proper basis is the practical study of criminals as men. Its lack of a controlling principle is not merely a fatal defect in its theory, but makes it, if not valueless, of very imperfect utility.

The end in view in society's dealing with crime should be its own protection. The ideal to be held before it is the elimination of crime. This aim is already recognized in many branches of law and administration as a potent motive. The police system is organized for the prevention of crime. Public education is largely supported with the same end in view. Many costly institutions, such as houses of refuge, protectories and juvenile reformatories, are maintained by the state mainly in the hope that characters tending to criminality may be diverted to true citizenship. But the general system of dealing with actual offenders against the law has been framed with no such definite purpose. It has gradually grown up by the assumption on the part of organized society of the right of retaliation, modified more and more by a superficial conception of distributive justice. Our penal law now undertakes to assign to each offence a punishment proportioned to its demerits. The fundamental principle of any reform must lie in doing away entirely with the conception of a scale of desert among offences, and in substituting for it harmonious and consistent methods of dealing with each criminal, as the interests of society demand. Instead of undertaking the impossible task of inflicting just punishment for past acts, the law must seek to ensure the avoidance of unsocial acts in the future.

Thoughtful minds have been profoundly stirred in recent years by the obvious failure of our penal laws to suppress or diminish crime. Some of the causes of this failure are obvious, and efforts

have been made in many jurisdictions to remove these by special laws or detailed amendments to existing codes. But these efforts have been largely fitful and experimental, not being founded upon any comprehensive principle inspiring the entire policy of the state. Among the obvious abuses of penal administration to which attention has been widely directed, the most conspicuous is the prevalent system of county jails. In the local prisons, for the detention of minor offenders and persons awaiting trial, the amelioration of conditions during the last century has been less marked than in any other public institutions known to our civilization. In 1827 the Reverend Sydney Smith wrote: "There are in every county in England large public schools, maintained at the expense of the county, for the encouragement of profligacy and vice and for providing for a proper succession of house-breakers, profligates and thieves. They are schools, too, conducted without the slightest degree of partiality and favor, there being no man (however mean his birth or obscure his situation) who may not easily procure admission to them. The moment any young person evidences the slightest propensity for these pursuits, he is provided with good clothing and lodging and put to his studies under the most accomplished thieves and cut-throats the county can supply." These conditions have been largely changed in England, but they prevail to a surprising extent to-day in a majority of our states. It is a very general practice to pay the sheriffs or other officers in charge of the jails by a daily allowance for each prisoner, nominally for his support, but large enough to insure a substantial profit, so that the absolute master of the unfortunate inmates for the time being has a direct pecuniary interest in keeping them as long as possible in confinement and in feeding them cheaply.

These jails are now the chief schools of crime and the great recruiting offices for the army of criminals. There are few habitual criminals but have been educated in them. In some counties there is no proper separation even of the sexes; in very many there is none between the convict and the accused, or even the witnesses under detention; between the professional burglar or thief and the unruly boy. In nearly all, the inmates are chiefly idle. These monstrous conditions are maintained by the local authorities, mainly on the pretext of economy, in violation of the explicit laws of many states. They are attracting much attention, and in special instances

have been mitigated. The fee system in the jails, too, must soon pass away. Reformers generally believe that all jails must be brought under the direct control of the state. Certain it is that the local jails in Great Britain, which were no better than ours before 1878, when they were brought under the centralized administration of the Home Office, have been nearly freed from these evils. There has since been a large reduction of the number of inmates and even of the number of jails. There is reason to believe that the supply of criminals has been largely checked by the change. A similar centralization of control in our states would doubtless effect excellent results, if exclusion of political influences from the state prison authorities were assured.

But another tendency is at work upon our laws which is at war with all reform. Every student must recognize the pernicious effect of short terms of imprisonment for minor offences. Apart from the corrupting associations of most local jails, confinement for a few days or weeks is demoralizing and degrading. It brands the prisoner as a jail-bird, and embarrasses his future. He often comes out stripped of self-respect, suspected and despised by others, and is driven permanently into crime. Such sentences have no tendency to reform the erring. They are dictated solely by the absurd notion that they are fit punishment for minor offences. But the number of such sentences is very great. Our police magistrates and petty tribunals are busy inflicting them, partly on "rounders" or habitual misdemeanants, frequently on the young who have for once impulsively or even inadvertently gone wrong. Now, while the uselessness and harmfulness of such sentences are well understood, and while the courts, under the pressure of public opinion, are increasingly loath to inflict them, the number of offences to which they are legally assigned is steadily increasing.

As society grows in complexity and the standard of social conduct is raised, there is a constant increase in the recognized obligations of the individual. New rights and new duties emerge, and the violations of them become new crimes. It is often observed that the improvement of public order and of the general conscience are marked by an increase in the number of legal offenders. For many acts are now prohibited as offences upon which the laws were formerly silent. Thus the business of criminal courts and prisons may be greater than before, when there is much less of real or serious

crime. It has even been suggested that the increase of crime becomes in this way a mark of advancing civilization. But the paradox is superficial, and turns upon an ambiguous use of the word crime.

It is a fact, however, that legislatures in their desire to suppress any practice which is pernicious or inconvenient are prone to define it as a crime, and to make it punishable by a term in jail. Thus New York, within five years, has added about thirty to the list of offences which the penal code denounces as worthy of imprisonment. Any person who lends or gives to another a newspaper chiefly made up of police reports must be sent to jail for at least ten days. One who sells a cigar on Sunday, or eats peanuts in a religious meeting, or, being a non-resident, gathers oysters in the state, may be imprisoned for a few days or weeks. A multitude of acts which may easily be committed by mere inadvertence are made misdemeanors and may be punished by incarceration for any fraction of a year. The mother of a child whose eye is red "from any cause," who does not at once inform a physician; the brakeman who couples a freight car after a passenger car; the citizen who advises his friend to leave the railroad service rather than wear a uniform; the layman who has an ounce of ether in his pocket without proof that he had no intention of improperly administering it as an anesthetic; each of these is a criminal before the law. If such statutes are enforced, they confound the public sense of justice, and become intolerably oppressive. But they cannot be generally enforced, and their empty threats of severity bring law itself into contempt. The constant increase in the list of such offences, however, adds materially to the number of moral and social victims of the local jails.

In our modern penal codes, imprisonment has become the usual mode of punishment for almost every crime. The old-fashioned spirit of vindictiveness which dictated the infliction of suffering upon offenders has passed away under humane influences. The whipping-post, the pillory, mutilations of various kinds, have been superseded by terms of imprisonment, and the tendency of what is called scientific penal legislation is more and more to limit legal penalties to confinement of more or less severity and of greater or less duration. The question what value there is in imprisonment, therefore, is of pressing importance, yet it cannot be said ever to have been satisfactorily investigated.

If imprisonment on the whole does good, it must be either, first, as a just retribution the infliction of which satisfies the moral sense of the community; or, secondly, as disarming the enemy of society and so protecting the community against him; or, thirdly, as tending to the conciliation of the character at war with men, by making him fit for citizenship. A proper study of the subject will address itself to the actual efficiency of imprisonment as an agency for each of these three purposes.

The conception of just punishment, though loosely held and associated vaguely with other ideas, is doubtless the foundation of penal law in the minds of most men. Incidentally, it is at times insisted that the chief practical value of punishment lies in its deterrent influence. The fear of the penalty is supposed to prevent crime. This consideration often influences legislation, and sometimes shapes the sentences passed by courts, but all experience has shown that the real deterrent effectiveness of even the severest penalties is insignificant in its influence upon the volume of crime at large. In fact, it is hardly felt at all except by habitual criminals, and then mainly in determining them to avoid crimes which are easily detected. Upon offences of sudden impulse, and upon the whole class of crimes which are first steps in a downward career, the threat of punishment has practically no influence.

But the avowed purpose of every criminal code is to apportion penalties according to the demerit of offences. If the attempt to do this is a failure, the entire system must be rejected as valueless. Now there is no superstition in the range of human thought more empty and unfounded than the belief that any penal code does or can assign punishments in any fair measure proportioned to the desert of offences. The most superficial comparison of the codes of different states and countries will show, not only that no rational principle controls the actual assignment of penalties, but that no such principle can be found. Who can measure the comparative merit of offenders by the names of particular acts which have been proved against them? The attempt to do so in legislation results in the most surprising inconsistencies. For example, as maximum penalties, Virginia inflicts six months' imprisonment for incest, and eight years for bigamy, but Colorado assigns twenty years for incest and two years for bigamy. The guilt of forgery is to that of larceny as four to one in Kansas, and as one to four in Connecticut. The

actual average sentence inflicted in Maine for perjury is one year, but in Florida it is ten years. The average sentence for robbery in California is one year, in Alabama it is twenty-two years. The man who in New York carries ether in his pocket, without proof that his intent is innocent, has precisely the same punishment denounced against him by law as the man who is guilty of incest or the man who attempts by poison to kill another; a penalty twice as great as is provided for the forger of stamps, the bigamist, the blackmailer, or the seducer under promise of marriage. These illustrations might be multiplied. There is not a page of any penal code in Christendom which does not suggest difficulties and embarrassments in the adjustment of punishments to crimes which are entirely insuperable. No rational purpose can be served by such a system. It is but the inertia of tradition and habit which preserves it.

It being evident, then, that the conception of penal law as a system of just retribution is without validity and without utility, it remains to consider what service, if any, the practice of imprisonment renders to society. It must be admitted that life in confinement and cut off from association with others is unnatural. A long period of complete subjection to the will of others and without individual initiative results, except for characters of unusual strength, in a paralysis of will. Nothing can unfit a man for society so surely as cutting him off from all society. It is, therefore, a first principle of reform that only necessity can justify imprisonment. A person who can be at large with safety to others ought never to be subjected to a term in prison. If it is unsafe for the community that he should be free, he must be confined; but the duration of confinement must be determined by the duration of the necessity. In other words, the only rational system of imprisonment is that which limits its application to those who cannot be trusted in freedom with safety for the rights of others, and all such should be subjected to such influences as will, if possible, prepare them for freedom, and released when they have given satisfactory evidence that confinement is no longer necessary. This is the great principle of the indeterminate sentence, which is the recognized basis of reform legislation in many of the states of the Union; but it has been as yet timidly and imperfectly embodied even in the foremost penal codes. One of its most valuable features, to which too little attention has been directed, is that it leads to the permanent seclusion of the irreclaimable. If crime is

ever to be extirpated, society must be resolute in its dealings with habitual and professional criminals. Any system which treats a recognized enemy of human society on the basis of a single act, and fixes, in view of that act, a definite term at the end of which he must be freed, to prey upon his fellows, is a fore-ordained failure.

It must not be disguised that these principles will necessarily lead to a large disuse of imprisonment. A growing sense of the evils which follow the practice, and especially of the fact that prisons and jails are the channels of supply for the criminal class at large, has already pressed strongly upon thoughtful men the necessity of finding a substitute for confinement. The probation laws of Massachusetts and of several other states have made an important beginning in this direction. It has been found that multitudes of the young, who have seemingly set out on the way to a criminal life, can be diverted from it and made decent citizens, if instead of the contamination and weakening influence of imprisonment, they are subjected to proper moral and social supervision under the intelligent direction of the court. There can be no doubt that the future progress of reform in penal law lies very largely in the direction of extending the scope of probation laws. Indeed, supervision and guidance by wise agencies wherever they have been applied to those who are discharged after a term of imprisonment, have been found at least as valuable in their reformatory influence as the best systems of discipline and education within the walls of institutions. The more efficiently such supervision can be exercised, the more successful will be our campaign against crime, and it is not too much to hope that in the progress of civilization the community at large will take, not only a deeper interest, but a progressively more active and useful part in this supervision.

CHARLTON T. LEWIS.

New York City.